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KINYO COATING (M) SDN BHD

v.

ICI PAINTS (MALAYSIA) SDN BHD & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
VAZEER ALAM MYDIN MEERA JC
[CIVIL SUIT NO: 22-764-2007]
1 SEPTEMBER 2010

C ***CIVIL PROCEDURE:*** *Pleadings - Sufficiency of - Defamation - Whether pleadings defective - Whether plaintiff provided sufficient details of publication - Plaintiff did not point out defamatory statements in publication - Whether sufficient - Whether identity of publishee pleaded - Rules of the High Court 1980, O. 18 r. 12 - Whether writ was properly*
D *endorsed - Rules of the High Court 1980, O. 78 r. 2*

CIVIL PROCEDURE: *Striking out - Pleadings - Whether details of defamatory report pleaded - Whether identity of publishee pleaded - Whether regurgitating entire report in pleadings sufficient - Whether report*
E *was absolute privilege*

TORT: *Defamation - Absolute privilege - Whether publication of report protected under s. 11 Defamation Act 1957 - Whether report attracted absolute privilege under common law*

F The plaintiff, a painting contractor, was hired to carry out painting works at a factory. The plaintiff was to use ICI paint for the job. Statements were made by the architect in charge of the painting works *ie*, the 2nd defendant that ICI paint was not used; consequently paint samples were collected for verification. The
G samples were collected by the 1st defendant, the manufacturer of ICI paints through its employees, Luke Wong being one of them, and sent to an independent laboratory for analysis. The analysis report confirmed that the paint samples did not match ICI paint. Prior to that, the plaintiff had initiated action against *inter alia* the
H 2nd defendant claiming that defamatory statements was published against him in the course of his trade ('consolidated suit'). The analysis report was used by the defendants in the consolidated suit against the plaintiff. The plaintiff's claim was subsequently dismissed. The plaintiff then brought a defamation action against
I the defendants on the basis that the conclusion of the report was false, as the paint samples were concocted. The 1st defendant

made the application to strike out the plaintiff's claim on the basis that the pleadings were defective. The 1st defendant also relied on the plea of absolute privilege.

Held (striking out plaintiff's claim):

(1) The plaintiff did not provide sufficient details of the publication. There was no details of the date of the publication or to the manner in which the report had disparaged the plaintiff's reputation; in fact the report did not even make reference to the plaintiff or to the source of the paint samples *ie*, from the said factory. This clearly offended O. 18 r. 12 Rules of the High Court 1980 ('RHC'). A publication that did not make reference to the plaintiff could not be defamatory of the plaintiff. (para 11)

(2) It was essential that the identity or particulars leading to the identity of the publishee be pleaded. It would not suffice to merely state that companies involved in similar industry as the plaintiff's would have read it, as pleaded by the plaintiff here. (para 14)

(3) In an action for libel, the plaintiff was required to endorse the writ with a statement giving sufficient particulars of publication in respect of which the action was brought to enable them to be identified as stated in O. 78 r. 2 RHC. This, the plaintiff failed to do. (para 15)

(4) The pleading was also defective for another reason *ie*, the plaintiff had simply regurgitated the entire report in the statement of claim without pointing out the parts which were alleged to be defamatory of the plaintiff. This was against accepted practice. (para 16)

(5) It was not disputed that the report was tendered as a court exhibit during the consolidated suit. The plaintiff did not object to the admissibility of the report during the said trial. The report and the statement complained of by the plaintiff in the statement of claim fell squarely within the ambit of s. 11 Defamation Act 1957. Furthermore, the report also attracted absolute privilege under common law. *Lincoln v. Daniels* (refd). (paras 20-22)

(6) The plaintiff's claim was that the paint samples did not exist and Luke Wong had concocted this evidence with others whose identity was at large. Luke Wong was merely collecting

samples for analysis; he was not the maker of the report. The mere collecting of samples could not be defamatory of the plaintiff. (para 23)

(7) The report merely stated that the paint samples were not ICI paint, the report did not make reference to the painting works or to the plaintiff. The report was used as a basis for the defence of justification at the consolidated suit; the plaintiff should have attacked the veracity and the accuracy of the report at that point in time. (para 24)

Case(s) referred to:

Abd Rahman Mamat lwn. Zakaria Senik & Yang Lain [2002] 1 LNS 278 HC ***(refd)***

Allsop v. Church of England Newspaper Ltd [1972] 2 QB 161 ***(refd)***

Batcha Ammal v. Ponnachi [1965] 1 LNS 11 FC ***(refd)***

BHLB Trustee Berhad & Anor v. HSBC (Malaysia) Trustee Berhad & Ors [2006] 5 CLJ 381 HC ***(refd)***

Bruce v. Odhams Press [1936] 1 KB 697 ***(refd)***

Dalglish v. Lowther [1899] 2 QBD 590 ***(refd)***

DDSA v. Times Newspapers [1973] 1 QB 21 ***(refd)***

Joceline Tan Poh Choo & Ors v. V Muthusamy [2007] 6 CLJ 1 FC ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***

Lincoln v. Daniels [1962] 1 QB 238 ***(refd)***

MCAT Gen Sdn Bhd v. CELCOM (M) Bhd [2007] 10 CLJ 356 HC ***(refd)***

Merricks v. Nott-Bower [1965] 1 QB 57 ***(refd)***

Philipps v. Philipps [1878] 4 QBD 133 ***(refd)***

Royal Aquarium and Summer and Winter Garden Society v. Parkinson [1892] 1 QB 431 ***(refd)***

Savant-Asia Sdn Bhd v. Sunway Pmi-Pile Construction Sdn Bhd [2008] 1 CLJ 191 CA ***(refd)***

Tan Seng Hin v. Editor of "See Hua Daily News" & Anor [2009] 7 CLJ 265 HC ***(refd)***

Legislation referred to:

Defamation Act 1957, s. 11

Rules of the High Court 1980, O. 18 r. 12(1), O. 78 r. 2

Other source(s) referred to:

Gatley on Libel and Slander, 9th edn, p 65-66

For the plaintiff - Michael Ho; M/s Sunny Khoo & Co

For 1st defendant - Francis Pereira (Datin Rosila with him); M/s Francis Pereira & Shan

Reported by Melinda Robert

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The plaintiff's action against the defendants is for defamation. By way of background, the plaintiff had sometime in 2002 initiated two suits for defamation at the Georgetown Sessions Court. In the first suit the defendant therein was one Ho Seng Keen and in the second suit the defendant was the second defendant herein. Both the Sessions Court suits were consolidated (consolidated suit) and heard together.

[2] The gist of plaintiff's complaint in the consolidated suit was that the defendants therein had published defamatory statements against the plaintiff in the course of the plaintiff's trade as a painting contractor. The plaintiff was appointed by Rimbaco Sdn Bhd as contractor to carry out painting works at the Motorola Technology Sdn Bhd (Motorola) factory at Bayan Lepas. The second defendant who was the architect supervising the contract works had remarked that the paint that was used by the plaintiff was adulterated and did not comply with the contract specified ICI Dulux Emulsion Pentalite paint manufactured by the first defendant. Upon the request of the second defendant, one Hafiz Leng and one Luke Wong Hwen Yeo (Luke Wong) who were employees of the first defendant carried out site inspection at Motorola to verify the usage of ICI paints at the factory building. Their initial finding was that the paint coating at Motorola did not match ICI paints and recommended that samples be taken for analysis by an independent laboratory. Luke Wong recommended that the analysis be done by Macromer (M) Sdn Bhd (Macromer) who is reputed to be well versed with ICI paint's chemical composition.

[3] Thereafter paint samples were gathered by Hafiz Leng, Luke Wong, Ho Keen Seng (defendant in the consolidated suit) and one EL Yong from Rimbaco Sdn Bhd. These samples were then sent to Macromer for analysis. Macromer then issued an analysis report (Macromer Report) which was tendered and marked as a defendants' exhibit in the consolidated suit. The Macromer Report was not favourable to the plaintiff and had confirmed that the paint samples were not ICI Dulux Pentalite. The Sessions Court dismissed the consolidated suit after trial. Luke Wong had given

A evidence for the defendants in the consolidated suit. The plaintiff appealed against that decision of the Sessions Court to the High Court. While the High Court appeal was pending, the plaintiff filed this present suit. The High Court has subsequently dismissed the appeal.

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[4] The subject matter of the present suit is the Macromer Report, as can be seen in para. 5 of the statement of claim. The plaintiff's complaint is that the paint samples were not taken from Motorola and that they were concocted by the defendants and
C therefore the basis for the Macromer Report conclusion is false.

[5] The plaintiff's claim against the second defendant was upon an application made by summons struck out by this court on 17 March 2010 *inter alia* on the grounds that:

D (a) the present suit was an abuse of process for the subject matter is the same as in the consolidated suit;

(b) the essential elements giving rise to an action for defamation had not been pleaded; and

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(c) the publication of the Macromer Report in the course of judicial proceedings in the Sessions Court is absolutely privileged.

[6] Following that the first defendant applied for the suit against
F them be struck out on similar grounds, namely defective pleadings and the plea of absolute privilege. Both parties had filed affidavits and written submissions. After hearing further oral arguments, I allowed the first defendants application and struck out the plaintiff's claim. The plaintiff has now appealed against that
G decision. I now give my grounds for that decision.

[7] I will take the issue of the pleadings, or the lack of it, first. Cotton LJ in *Philipps v. Philipps* [1878] 4 QBD 133, 139 aptly said:

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> In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

I

Similarly in *Batcha Ammal v. Ponnachi* [1965] 1 LNS 11, the court held that pleadings should contain particulars to ensure that the parties are informed with reasonable particulars as to the matters which are alleged against them. Further, O. 18 r. 12(1) of the Rules of the High Court (RHC) provides that:

> Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies

[8] The elements of defamation which are absolutely necessary to be shown within the pleadings are:

(a) the publication by the defendant, the words published;

(b) that the words are false;

(c) that the words were published of the plaintiff or referring to the plaintiff;

(d) the facts relied on as causing them to be understood as defamatory; and

(e) its negative effect on the plaintiff.

[9] The plaintiff's statement of claim in summary simply avers that:

(a) allegedly, 'the paint sample was non existent' and that 'it was concocted by the first defendant';

(b) the plaintiff had painted on 'gypsum board' whereas the Macromer Report analysis was on the soft board; and

(c) the plaintiff therefore contents that the Macromer Report 'was false' as 'the analysis was conducted on the wrong board'.

[10] In respect of publication the plaintiff avers in para. 9 of the statement of claim as follows:

> Tambahan lagi, analisa yang dikatakan tersebut telah diterbitkan dan dibacakan secara meluas oleh pihak syarikat-syarikat yang mempunyai perniagaan yang sama dalam bidang cat. Penerbitan ini telah memfitnahkan pihak Plaintif.

[11] This is clearly insufficient to found a cause of action on defamation. The plaintiff did not provide sufficient details of publication, if any. The plaintiff did not give it a date. The name of the publishee is unknown, neither is the manner of publication pleaded. This offends O. 18 r. 12 RHC. There is no explanation in the pleadings as to how the Macromer Report had resulted in any disparagement of the plaintiff's reputation. In fact, the Macromer Report does not refer to the plaintiff, nor does it refer to the Motorola factory as the source of the paint samples. A publication that does not refer to the plaintiff cannot be defamatory of the plaintiff. The House of Lords case of *Knupffer v. London Express Newspaper Ltd* [1944] AC 116 is authority for that proposition:

> It is an essential element of the cause of action for libel that the words complained of should be published 'of plaintiff'. Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not aries if they cannot in law be regarded as capable of referring to him.

[12] Similarly in *Abd Rahman Mamat lwn. Zakaria Senik & Yang Lain* [2002] 1 LNS 278 the disputed article did not name the plaintiff or anyone else. It was held that the absence of pleading of facts or the extrinsic evidence that could link the said words complained of to the plaintiff would mean that the plaintiff had failed to discharge the burden that the words in the article had defamed. Accordingly, the court concluded that the plaintiff did not have a cause of action against the defendant.

[13] In *Gatley on Libel and Slander*, 9th edn at p. 65-66, the case of *Bruce v. Odhams Press* [1936] 1 KB 697 was referred for the proposition that where the plaintiff does not plead sufficient facts of reference to the plaintiff or establish the link between himself and the words used, his claim will be struck out. In *MCAT Gen Sdn Bhd v. CELCOM (M) Bhd* [2007] 10 CLJ 356 Abdul Malik Ishak J (now Court of Appeal judge) said:

> There must be publication before an action for libel is instituted (*R v. Burdett* [1820] 4 B & Ald 95; *Entick v. Carrington* [1765] 19 State Tr 1029; *Edwards v. Wooton* [1607] 12 Co Rep 35; and *R v. Stockdale* [1789] 22 State Tr 237 at 300). The words published must concern the plaintiff (*Baldwin v. Elphinston* [1775] 2 Wm B1 1037, Ex Ch; and *O'Brien v. Clement* [1846] 16 M & W 159).

[14] To found a cause of action in defamation it is essential that the name of each publishee be pleaded (see *Dalglish v. Lowther* [1899] 2 QBD 590), and if unknown the best available particulars as to identity must be given. It would not suffice to merely state that companies involved in similar industry with the plaintiff would have read it, as pleaded by the plaintiff herein. The identity or particulars leading to the identity of the publishee must be pleaded.

[15] The High Court in *Tan Seng Hin v. Editor of "See Hua Daily News" & Anor* [2009] 7 CLJ 265 held that the pleadings therein had failed to satisfy the procedural rules which need to be complied with in respect of a defamation suit. The court referred to *Allsop v. Church of England Newspaper Ltd* [1972] 2 QB 161 and O. 78 r. 2 of the RHC where it was held that in an action for libel the plaintiff was required to endorse the writ with a statement giving sufficient particulars of publication in respect of which the action is brought to enable them to be identified. This, the plaintiff failed to do.

[16] The pleading is also defective for another reason. The plaintiff has simply regurgitated the entire Macromer Report in the statement of claim without pointing out the parts which are alleged to be defamatory of the plaintiff. This is against accepted practice. In the English Court of Appeal decision of *DDSA v. Times Newspapers* [1973] 1 QB 21, CA Lord Denning MR in restoring the master's order to strike out the pleadings therein held as follows:

> ... the pleading is defective because it throws - and I use the word deliberately - on to the defendants a long article without picking out the parts said to be defamatory. Some of the article is not defamatory of anyone at all. Yet other parts may be defamatory of the plaintiffs. To throw an article of that kind at the defendants and indeed at the court, without picking out the particular passages, is highly embarrassing. Master Bickford Smith put it very sensibly:

> It is tremendously embarrassing to claim the whole of the article as a libel. There is tremendous amount of the article which is not defamatory of your clients. You must pick out the particular bits and rely on the rest as extrinsic or surrounding facts giving a defamatory meaning to the words.
>
> That ruling is in accord with the practice as it has been known for many years. The plaintiffs must specify the particular parts defamatory of them.

Applying this dictum to our present case, the pleadings out to be struck out for this reason alone, as it is highly embarrassing to the First Defendant.

[17] In *BHLB Trustee Berhad & Anor v. HSBC (Malaysia) Trustee Berhad & Ors* [2006] 5 CLJ 381, the court held that inefficient preparation of pleadings would invariably result in dire consequences. In that case, the plaintiffs had no basis to file a claim against the 3rd defendant who would have a *prima facie* defence of privilege - yet the plaintiffs failed to plead malice on the part of the 3rd defendant. The court struck out the plaintiff's claim and action against the 3rd defendant.

[18] Now moving on to the next point, that is the defence of absolute privilege. The law as to absolute privilege has two sources; one is statute and the other is common law. The first defendant submits that the publication of the Macromer Report during the course of the trial of the consolidated suit raises the defence of absolute privilege. The statement complained was made in the presence of a judge during judicial proceedings ('coram judice'). Law reports and subsidiary material that arise from judicial proceedings are absolutely protected under s. 11 of the Defamation Act 1957:

> 11. Reports of judicial proceedings
>
> (1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

(2) Nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter or any matter the publication of which is prohibited by law.

[19] In Malaysia, the highest court to consider this question absolute privilege in matters coram judice was the five man panel of the Federal Court judges in the review application of *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2007] 6 CLJ 1, where it was held that:

> To be qualified for absolute privilege under s. 11(1), a report has to be, in the first place, the report of proceedings publicly heard before a competent court. That is the subject of the report. In the second place, it has to be fair and accurate and contemporaneous. That is the quality of the report. If it is not fair or not accurate or not contemporaneous, it fails as to quality and does not qualify for absolute privilege. If the report is not a report of proceedings publicly heard before a competent court, it fails as to subject and does not qualify for absolute privilege and the question as to quality, whether it is fair, accurate or contemporaneous, does not arise and is irrelevant, or it does not matter whether it is or is not fair, accurate or contemporaneous. The question as to quality arises and is relevant or matters only if the report is the report of proceedings publicly heard before a competent court, that is, it qualifies as to subject.

[20] It is not disputed that the Macromer Report was tendered as a court exhibit by the defendants therein during the trial of the consolidated suit. The plaintiff who was also the plaintiff in the consolidated suit did not object to the admissibility of the Macromer Report. The Sessions Judge in her judgment has referred to the Macromer Report. The first defendant argues, therefore, that the Macromer Report and the statement complained of by the plaintiff in the statement of claim falls squarely within the ambit of s. 11 of the Defamation Act 1957. I agree with the first defendant's submission.

[21] The common law concept of absolute privilege gives a somewhat wider protection as seen in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* [1892] 1 QB 431 and as established in the Malaysian Court of Appeal case of *Savant-Asia Sdn Bhd v. Sunway Pmi-Pile Construction Sdn Bhd* [2008] 1 CLJ 191. The application of the defence of absolute privilege to matters done *coram judice* is well expounded by Devlin LJ in *Lincoln v. Daniels* [1962] 1 QB 238 at 257:

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M' Ewan*, in which the House of Lords held that the privilege attaching to evidence which a witness gave *coram judice* extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White*, the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[22] Based on the dicta of Devlin Lj as above, the Macromer Report attracts absolute privilege under all three limbs, as it has all three qualities:

(a) the Macromer Report formed part of the records of judicial proceedings in that it was an exhibit put by the defendants in the consolidated suits;

(b) it formed part of the evidence in the course of the proceedings in the consolidated suit. The witness DW1 had on 4 August 2006 during proceedings referred to the Macromer Report; and

(c) at the end of the trial the Sessions Judge had made reference to the Macromer Report in her judgment.

[23] The plaintiff argues that the Sessions Court did not take into account the Macromer Report in the judgment as the maker of that report was not called as a witness. That argument cannot stand as it is very clear from Devlin LJ's dicta that it is "immaterial whether the proof is or is not taken in the course of proceedings". The identity of Luke Wong as one of the persons who took the paint samples at the Motorola factory was only revealed in the course of evidence in the consolidated suit. The meat of the plaintiff's claim is that the paint samples do not exist and that

Luke Wong had allegedly concocted this evidence with others whose identity is at large. Luke Wong is not the maker of the Macromer Report, nor is the first defendant. Luke Wong was one of several persons who collected the sample of paint for analysis by Macromer. The mere collection of the sample cannot be defamatory of the plaintiff.

[24] The Macromer Report merely states that the paint samples were not ICI Dulux Pentalite. The report does not make reference to the Motorola project, and worse of all, to the plaintiff. The defendants had used that report to prove their defence of justification in the consolidated suit. The Sessions Court would have been the best place to attack the veracity and accuracy of the Macromer Report. The plaintiff failed to do that. Instead the plaintiff has embarked on this fruitless journey.

[25] I find that the publication of the Macromer Report enjoys absolute protection and the plaintiff's statement of claim ought to be struck out under the principles in *Merricks v. Nott-Bower* [1965] 1 QB 57.

[26] Wherefore, I order that the plaintiff's claim against the first defendant be struck out with cost.